STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6545

Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC, and related transactions

Docket No. 7082

Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a certificate of public good to construct a dry-fuel-storage facility at the Vermont Yankee Nuclear Power Station in Vernon, Vermont

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificates of Public Good and other approvals required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A. §§ 231(a), 248 & 254, for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent-nuclear fuel

Order entered: 11/29/2012

## ORDER RE: MOTION TO AMEND

### I. INTRODUCTION

On May 29, 2012, Entergy Nuclear Vermont Yankee, LLC ("ENVY"), and Entergy Nuclear Operations, Inc. ("ENO") (jointly, "Entergy VY" or the "Company"), filed a Motion pursuant to Vermont Rule of Civil Procedure 60(b) and Public Service Board ("Board")

Rule 2.221, for relief from the Board's June 13, 2002, Order in Docket 6545 (referred to herein as the "Sale Order"), and the April 26, 2006, Order and Certificate of Public Good ("CPG") in Docket 7082 (the "Dry Fuel Storage" or "DFS" Order and CPG). Entergy VY requests that the Board modify Condition 8 of the Sale Order, which prohibited operation of the Vermont Yankee Nuclear Power Station ("Vermont Yankee") after March 21, 2012, without Board approval. Entergy VY also asks that we modify conditions in the Dry Fuel Storage Order and CPG that limit the amount of spent nuclear fuel ("SNF") that Entergy VY may store at the Vernon site to amounts generated from operation up to March 21, 2012.

In this Order, the Board denies Entergy VY's Motion. Entergy VY cites two basic reasons for relief — (1) that it was unforeseeable that the Board would rule that 3 V.S.A. § 814 did not extend the conditions on the sale of Vermont Yankee mandating that the Station not operate after March 21, 2012, and the conditions in the Dry Fuel Storage Order and CPG that had similar limitations;[1] and (2) that it was not foreseeable that the Vermont legislature would interject itself into the process for reviewing Entergy VY's request for the right to operate after March 21, 2012, and effectively prevent the Board from issuing a decision on that request. We find that Entergy VY has not demonstrated a basis for relief under Rule 60(b). As to the conditions in the Board's Sale Order and DFS Order and CPG, a review of those Orders indicates that the Board's conclusion in Docket 7440 that Section 814 did not apply to the conditions at issue should not have been a surprise to Entergy VY. Instead, we find that Entergy VY has shown no reason to have expected any other outcome. We also conclude that, although we recognize that the legislature took actions that changed the legal landscape, Entergy VY's claimed hardship — the risks associated with operation after the deadline for termination set out in Condition 8 of the Sale Order — is in large part the result of tactical decisions Entergy VY made concerning legislative strategy, the timing of legal challenges, and the structure of its petition to the Board. The Vermont Supreme Court has determined that Rule 60(b) relief is not available to relieve a party of its tactical choices.

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1. Citing to the Board's March 19, 2012, Order in Docket 7440, in which the Board concluded that while Section 814 operated to extend the Sale CPG itself (and conditions therein), the conditions in the Sale Order (as opposed to the CPG) and Dry Fuel Storage Order and CPG raised in the motion at issue today were not extended.

We want to make clear — this Order is narrow. We address only Entergy VY's request for relief under Rule 60(b). Because we do not accept Entergy's arguments concerning foreseeability, which were the basis for its motion, we deny the request and do not reach any conclusions concerning the merits of modifying or extending Entergy VY's obligations under existing Orders and CPGs.

Entergy VY filed its motion in Dockets 6545 and 7082. However, in many respects, Entergy VY's motion implicitly challenges the Board's March 19 Order in Docket 7440. Because this Order of necessity responds to those challenges, the Board is also issuing this Order in Docket 7440.

## II. BACKGROUND

The motions now before the Board request that the Board modify conditions in two Orders that we issued years ago. The procedural histories of those two proceedings — Docket 6545 and Docket 7082 — are extensive and were discussed at length in previous Board Orders in these proceedings.[2] We will only briefly summarize the key portions.

In Docket 6545, the Board considered a petition under which Entergy VY would acquire Vermont Yankee from its existing owner, the Vermont Yankee Nuclear Power Corporation ("VYNPC"). Two Vermont utilities, Green Mountain Power Corporation ("GMP") and Central Vermont Public Service Corporation ("CVPS") owned more than 50% of the shares of VYNPC. At the time of the proposed sale, CVPS maintained a 35% ownership stake; GMP owned 20% of VYNPC.[3] After extensive hearings, the Board issued a final Order conditionally approving the sale transactions on June 13, 2002, as well as a CPG authorizing ENVY and ENO, respectively, to own and operate Vermont Yankee. Among the conditions the Board adopted were Conditions 7 and 8, which directly addressed the limits on Entergy VY's ability to operate the station that were being imposed as a condition of the sale.

> 7. Pursuant to 30 V.S.A. § 231, a Certificate of Public Good, to expire on March 21, 2012, shall be issued to Entergy Nuclear Vermont Yankee, LLC to own the Vermont Yankee Nuclear Power Station and to Entergy Nuclear

2. *See* primarily Docket 6545, Order of 6/13/02 and Docket 7082, Order of 4/26/06.
3. Docket 6545, Order of 6/13/02 at 13.

> Operations, Inc. to operate the Vermont Yankee Nuclear Power Station as described in the foregoing findings.
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> 8. Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012.[4]

The CPG did not include these conditions. Instead, the CPG stated that it would expire on March 21, 2012.[5]

Subsequently, Entergy VY sought a revision of the CPG, so that in final form it states that ENVY and ENO were authorized "to own and operate Vermont Yankee beyond March 21, 2012, solely for the purpose of decommissioning."[6] No action has occurred in the Docket between 2002 and the filing of Entergy VY's current motion.

In Docket 7082, the Board reviewed a request by Entergy VY for a CPG authorizing the construction of the spent fuel storage facility. Entergy VY had determined that it did not have sufficient capacity to store spent fuel to allow it to operate until the end of its operating license (March 21, 2012). However, Entergy VY also requested authorization to construct a larger storage facility than needed to accommodate operation until 2012.

The Board conditionally granted Entergy VY's request and issued a CPG authorizing construction of the spent fuel storage facility. The Board's Order and CPG included a number of conditions. Entergy VY seeks modification of Conditions 4 and 7 of the Order (and Conditions 3 and 6 of the CPG, which are identical to the Order conditions). These conditions state as follows:

> 4. The cumulative total amount of spent nuclear fuel stored at Vermont Yankee is limited to the amount derived from the operation of the facility up to, but not beyond, the end of the current operating license, March 21, 2012. This capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.

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4. Docket 6545, Order of 6/13/02 at 159.

5. Docket 6545, CPG at 1. The CPG was subsequently amended (at Entergy VY's request) in our July 11, 2002, Order to state that ENVY and ENO were "authorized to own and operate Vermont Yankee beyond March 21, 2012, solely for the purposes of decommissioning." Order 0f 7/11/02 at 17.

6. Docket 6545, Order of 7/11/02 at 17.

> 7. Compliance with the provisions of the Certificate of Public Good and this Order shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before Entergy VY, its successors or assigns, may operate the facility beyond that date, the owners must first obtain a Certificate of Public Good from the Board under Title 30.[7]

Following issuance of the Order and CPG, Entergy VY constructed the dry fuel storage facility. No action has taken place in Docket 7082 since 2006.

Entergy VY filed its motion to amend the above-referenced conditions on May 25, 2012. Entergy VY states that its motion was prompted by a Board Order in Docket 7440 that interpreted Vermont law in a manner that Entergy VY had not anticipated and that had the effect of making adherence to the above conditions unfair. In Docket 7440, the Board considered a petition from Entergy VY to authorize ENVY and ENO to own and operate Vermont Yankee for an additional 20 years. In February 2012, Entergy VY requested a Declaratory Ruling from the Board that Entergy VY could continue operating Vermont Yankee beyond the March 21, 2012, license expiration due to 3 V.S.A. § 814(b), which provides:

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

The Board denied Entergy VY's motion. The Board stated that "the 'part' of the Docket 6545 CPG that authorizes operation of Vermont Yankee is extended pursuant to Section 814(b)."[8] However, the Board also concluded that "Condition 8 [of the Board's Order] is a requirement of the order approving the sale of Vermont Yankee to Entergy VY, not part of the licensure of a continuing activity. Section 814(b) applies to licenses for an 'activity of a continuing nature.'"[9] The Board observed that under the plain language of the statute:

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7. Docket 7082, Order of 4/26/06 at 90.
8. Docket 7440, Order of 3/19/12 at 15.
9. *Id.* at 16.

> Section 109 requires the seller, not the buyer, to obtain Board approval. While such approval may be conditioned on agreements or other actions by the purchaser,[10] Section 109 requires the seller to obtain the Board's consent. In contrast, a purchaser's "license" for the continued ownership and operation of the facility is a CPG issued pursuant to 30 V.S.A. § 102 or (as here) § 231.[11]

As to Entergy VY's assertions with respect to the Docket 7082 CPG, the Board concluded that "The authorization for the continuing activity of storing SNF does not expire, and thus there is no expiring license to which Section 814(b) might apply."[12] The Board also found that only the legislature could authorize storage of spent fuel derived from operation after March 12, 2012. Accordingly, the Board stated that Entergy VY's Petition to amended the DFS CPG to expand the amount of SNF that may be stored at Vermont Yankee was actually a request to the legislature, not the Board:

> this Board lacks authority under state law to approve the storage of an amount of SNF beyond that derived from operation of Vermont Yankee through March 21, 2012. Accordingly, Entergy VY's Petition in this proceeding did not request the Board to amend the Docket 7082 CPG to expand the amount of SNF that may be stored at Vermont Yankee.[13]

As a result, Section 814(b) was inapplicable to the Board's CPG since no relief had been requested of the Board that it had the power to grant.

More than two months after that Order, Entergy VY filed the present motions. The Board requested comments from the parties; Entergy VY also filed reply comments on July 2, 2012.

## III. POSITION OF THE PARTIES

### A. Entergy VY

Entergy VY argues that the Board should exercise its discretion under Rule 60(b) to amend the Conditions noted above "because the Board's decision regarding the applicability of Section 814(b) to these Orders and [the Docket 7082] CPG was unforeseeable" as were the

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10. By way of example, if a company sought to sell for scrap a generation facility that required Section 109 approval, the Board might condition such approval on certain undertakings from the purchaser, such as measures to protect environmental quality during the dismantling of the facility, but no licensing requirements would apply to the purchaser. [Footnote in original.]

11. *Id.* at 17.

12. *Id.* at 20.

13. *Id*. at 21.

General Assembly's actions that made it impossible for the Board to decide Entergy VY's original petition for a CPG before the March 21, 2012, expiration date. Entergy VY contends that Rule 60(b) is intended to prevent hardship or injustice and be liberally applied.

Entergy VY asserts that at the time of the Board's Orders in Docket Nos. 6545 and 7082, the Company could not have foreseen that the conditions would not be subject to 3 V.S.A. § 814(b) which would extend their term pending a final determination of the Board on the relicensing request. Entergy VY contends that, at the time of the Board Orders, the Board recognized the possibility that Entergy VY would seek to extend its license. In this context, argues Entergy VY, it was reasonable to expect that Section 814(b) would apply. Because of this understanding, Entergy VY asserts in its reply comments that it had no reason to appeal the Board's determination.

Entergy VY also argues that relief is appropriate because the Company could not foresee that the Board would not (or could not) rule on Entergy VY's petition prior to the March 21, 2012, expiration of its right to operate in Vermont. Entergy VY cites to the various legislative enactments that occurred between issuance of the Docket 6545 Order and CPG and the present. According to Entergy VY, these enactments changed the legal landscape in ways that were unforeseen and prevented Entergy VY from having a final Order.

Entergy VY submits that it will "suffer substantial hardship" unless the Board modifies the Orders and CPGs because their enforcement could have negative consequences for Entergy VY. The hardship cited by Entergy VY is the risk that the Board will penalize Entergy VY or deny its petition because it is currently operating without authority under state law. In fact, Entergy VY states that, if the Board were to clarify that its present operation could not be held against the Company, it would withdraw its rule 60(b) motion.

**B. Department of Public Service**

The Department of Public Service ("Department") argues that, under Board precedent, a Rule 60(b) motion requires the petitioning party to demonstrate extraordinary circumstances and, according to the Department, such circumstances do not exist. The Department asserts that the U. S. District Court had barred the Board from taking actions to compel Entergy VY to cease

operations, so that failure to grant the relief would not harm Entergy VY. The Department also contends that Entergy VY's motion is essentially a request to have the Board reconsider its determination in Docket 7440 that the deadlines in Condition 8 of the Docket 6545 Order were not affected by Entergy's application for a new CPG, since the condition related to the sale.

**C. New England Coalition**

The New England Coalition ("NEC") argues that Entergy VY has failed to file for relief under Rule 60(b) within a reasonable time as required by that rule. NEC contends that, since Entergy VY's motion is based upon surprise at the intervening events, and that surprise falls under Rule 60(b)(1) which has a strict time frame, the motion is untimely and relief under the broader provisions of Rule 60(b)(6) is not available. Furthermore, NEC maintains that Entergy VY has failed to demonstrate "extraordinary circumstances" justifying the significant delay; instead, according to NEC, Entergy VY merely argues that certain events were unforeseen. Furthermore, NEC asserts that, even if surprise has occurred, Entergy VY waited more than 70 days after the Board's March 19, 2012, Order in Docket 7440 to file the instant request, rather than proceeding within a reasonable time.

NEC also contends that Entergy VY has not shown any hardship. NEC states that the hardship cited by Entergy VY is based upon potential enforcement of certain conditions in prior Orders and CPGs. NEC maintains that nothing in the record suggests that Entergy VY will face penalties for operation after the March 21, 2012, expiration date. NEC argues that, to the extent that Entergy VY seeks to avoid having its present operation affect the outcome of the relicensing proceeding (Docket 7862), Entergy VY should seek relief in that docket. More broadly, NEC asserts that Entergy VY's argument for hardship is illogical, since any harm arises from conditions the Board established in Orders years ago and that Entergy VY elected not to challenge.

NEC further argues that Entergy VY cannot challenge Condition 8 of the Docket 6545 Order since it applies to the sellers of Vermont Yankee, not Entergy VY. Finally, NEC contends that, even if the Board were to grant Entergy VY's motion, it cannot simply modify the previous Orders and CPGs, but must instead vacate them and hold further hearings.

**D. Conservation Law Foundation**

The Conservation Law Foundation ("CLF") maintains that Entergy VY is not entitled to relief pursuant to Rule 60(b). CLF argues that Rule 60(b) is not available to protect a party from tactical decisions that it had previously made. Moreover, according to CLF, the burden under Rule 60(b) is greater when the party voluntarily accepts a previous decision, just because at a later date that outcome proves to be disadvantagesous.

CLF also contends that Entergy VY's request is untimely as it comes ten years after the Board's Docket 6545 decision and six years after the Docket 7082 Order. CLF asserts that Entergy VY's multiple claims of unforeseeability are essentially arguments that Entergy VY was surprised; such claims would fall under Rule 60(b)(1) which has a one-year time period. Even if the request is not considered to be based upon surprise, CLF submits that the delay of six to ten years is not within a reasonable time.

CLF adds that Entergy VY has failed to identify any harm that it suffers as a result of the conditions in the prior Board Orders. CLF asserts that Entergy VY had no guarantee of continued operation and is not entitled to relief that would effectively sanction such operation.

**E. Windham Regional Commission**

The Windham Regional Commission ("WRC") states that it does not oppose Entergy VY's Motion. However, WRC argues that the Board Orders in Dockets 6545 and 7082 reflected careful balancing and that Entergy VY's proposed amendments would significantly alter that balance. WRC asserts that it and other parties relied upon Entergy VY's commitments in MOUs in those previous dockets, commitments that WRC contends that Entergy VY now seeks to modify. Accordingly, WRC asks that if the Board grant Entergy VY's requested relief, it also rebalance all of the other conditions so as to provide public benefits comparable to those gained by Entergy VY. WRC identifies that the Board consider seven additional conditions necessary to address the change in balance.

WRC also argues that the possibility that Entergy VY would be required to shut down was "completely foreseeable," particularly in light of Entergy VY's express MOU commitment to shut down in the absence of Board approval. Similarly, WRC points to the express language in

Condition 7 of the Sale Order stating that Entergy VY "must first obtain" a CPG to enable operation past March 21, 2012. As to Entergy VY's claim that legislative intervention in the relicensing process was unforeseen, WRC points first to the fact that Act 74 was initiated at Entergy VY's request and that Entergy VY specifically negotiated for certain aspects of the legislation (such as the ability to build a larger spent fuel storage pad than needed).

**F. Vermont Natural Resources Council and Connecticut River Watershed Council**

The Vermont Natural Resources Council ("VNRC") and Connecticut River Watershed Council ("CRWC") argue first that Entergy VY's Rule 60(b) motion is untimely. VNRC and CRWC assert that Entergy VY's present motion is essentially that the Company was surprised, which would fall within Rule 60(b)(1). However, relief under that Rule must be made within one year. Even if the Board treats the motion as one filed under Rule 60(b)(6), VNRC and CRWC echo CLF's argument that a delay of six to ten years is not "within a reasonable time" as required by the rule.

VNRC and CRWC also urge us to deny Entergy VY's motion because they consider the motion to be essentially seeking a remedy for Entergy VY's failure to appeal. Citing the Board's previous ruling in *Petition of RC Atlantic Inc. For Designation as an Eligible Telecommunications Carrier*, Docket 6934, Order of 1/10/05, VNRC and CRWC maintain that Rule 60(b) relief is not available as a substitute for a timely appeal. VNRC and CRWC cite to the fact that the conditions that Entergy VY now seeks to amend were set out in the Board's previous Orders and Entergy VY elected not to appeal them.

**G. Vermont Public Interest Research Group**

Vermont Public Interest Research Group ("VPIRG") asserts that Rule 60(b) does not authorize modification of parts of a judgment (unlike Rule 59(e)). Instead, according to VPIRG, the Vermont Supreme Court has held that the only appropriate relief under Rule 60(b) is vacating

the judgment and setting the matter for new trial.[14] VPIRG argues that the Board could hold a simultaneous hearing on whether to vacate the previous Orders and the appropriate changes to such Orders, but that Entergy VY cannot simply pick and choose which aspects of the orders it seeks to have changed.

VPIRG also contends that the Rule 60(b) motion is barred by the doctrines of issue preclusion and claim preclusion. VPIRG observes that Entergy VY had the opportunity to appeal the Orders that it now seeks to modify, but elected not to. According to VPIRG, this choice now precludes Entergy VY from raising the issues now before the Board.

## IV. LEGAL STANDARD

Entergy VY requests that the Board grant relief pursuant to V.R.C.P. 60(b)(6), which is made applicable to Board proceedings by Board Rule 2.221. In relevant part, that rule states that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time. . . .

The Vermont Supreme Court has made clear that a trial court has broad discretion in deciding a Rule 60(b) motion. The Court has determined that "relief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus to be liberally construed and applied."[15] It is designed to give the court the flexibility to see that the rule serves the end of justice.[16] At the same time, Rule 60(b)(6) "may not be used to relieve a party from free, calculated, and deliberate choices he has made."[17] Rule 60(b) motions are

14. VPIRG cites to *Smith v. Smith*, 139 Vt. 234, 235, 428 A.2d 378, 379 (1981) and *Cliche v. Cliche*, 143 Vt. 301, 307, 466 A.2d 314, 317 (1983) in support of this argument.

15. *Greenmoss Builders, Inc., vs. Dunn & Bradstreet, Inc.*, 149 Vt. 365, 368, 543 A.2d 1320, 1322 (1988) (citing *Cliche v. Cliche*, 143 Vt. 301, 306, 466 A.2d 314, 316 (1983).

16. *In re Town Highway 20*, 45 A. 3d 54, 82 (2012).

17. *Greenmoss Builders*, 149 Vt. at 368, 543 A.2d at 1322.

ordinarily not available to those whose tactical choices turn out to be ill-advised or to relieve one from the effects of a stipulation freely made.[18]

Rule 60(b)(6) is also not intended to be used as a substitute for relief under one of the first five subsections of V.R.C.P. 60(b). To the contrary, relief is only available when a ground justifying relief is not encompassed within any of the first five classes of the rule."[19]

The Board is also not required to hold a hearing on a Rule 60(b)(6) motion. The trial court's discretion over such motions extends to the question of whether to hold a hearing.[20]

## V. DISCUSSION

### A. The Deadline in Docket 6545

Entergy VY's first assertion is that it could not foresee at the time of the Board's Docket 6545 that the Board would later rule that Condition 8, which terminated Entergy VY's right to operate Vermont Yankee on March 21, 2012, was not extended by 3 V.S.A. § 814(b). Based upon our review of Entergy VY's present filings, the testimony leading up to the adoption of Condition 8, and Entergy VY's own representations to the Board, we reach the opposite conclusion — the Board's Docket 7440 Order specifying that Condition 8 was not extended under Section 814(b) was entirely foreseeable. This is true, in particular, since Condition 8 was included in the Order to enforce Entergy VY's specific commitment to cease operation on March 21, 2012 (absent a new CPG), a commitment which Entergy VY asked the Board to rely upon in approving the transaction.[21]

In Docket 7440, the Board concluded that Section 814(b) did not apply to Condition 8 of the Docket 6545 Order for three reasons. First, the Board found that it was a condition of the sale of Vermont Yankee (under 30 V.S.A. § 109), not a condition of the license issued to Entergy VY authorizing further operation. As a condition on the approval of a discreet transaction (the sale of Vermont Yankee) as opposed to a condition on a continuing activity, the Board found that

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18. *Goshy v. Morey*, 149 Vt. 93, 97, 539 A.2d 543, 546 (1987). *See also Richwagen v. Richwagen*, 153 Vt. 1, 4, 568 A.2d 419, 421 (1989)("we have held that we will not grant relief 'from tactical decisions which in retrospect may seem ill advised.'").

19. *Pierce v. Vaughan*, 44 A.3d 758, 761 (2012).

20. *In re Chittenden Solid Waste District*, 44 A. 3d 753, 757 (2012).

21. Docket 6545, Entergy VY Proposed Findings at 17–18; Order of 6/13/02 at 82.

Section 814(b) did not apply. Second, the Board stated that even if Condition 8 could be construed to be a license, Entergy VY had not sought modification of the condition by filing an appropriate motion in Docket 6545; such a motion was necessary for Section 814(b) to operate. Third, the Board found that Entergy VY's interpretation would essentially make Condition 8 superfluous and effectively meaningless.[22]

Entergy VY's Motion fails to explain how the Board's ruling on any of these three bases was unforeseeable. It's argument is largely that it had expected that application for extension of the CPGs would enable it to continue to operate beyond March 21, 2012, due to Section 814(b). However, it has presented no analysis demonstrating that the Board's ruling was erroneous and thus not reasonably foreseeable.

The record of testimony, briefs, and Orders on which our March 19 Order was based shows that Entergy VY should have anticipated the Board's rulings and, in the case of the Sale Order, actively sought the deadline whose application it now claims to be surprised about.

The Board opened Docket 6545 in 2001 to consider a request by Entergy VY, VYNPC, GMP, and CVPS for approval of several transactions under which Vermont Yankee (but not VYNPC) would be sold to Entergy VY.[23] At the time of the request, Vermont Yankee was owned by VYNPC; CVPS owned 35% of VYNPC and GMP owned 20%, so that the two largest Vermont utilities collectively held a majority interest.

One of the concerns raised during the proceeding was that the sale would result in a loss of Board authority to influence whether Vermont Yankee would be relicensed in the future.[24] The Board did not directly regulate Vermont Yankee or VYNPC, but due to VYNPC's ownership of the plant and the Board's ability to regulate the two Vermont utilities that owned a majority of VYNPC, the Board nonetheless retained some ability to influence events at Vermont Yankee. As the Board's Order described the pre-sale status:

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22. The Board also stated that Entergy VY's interpretation would render meaningless Condition 3 of the Docket 6545 Order, which approved the Docket 6545 MOU that contained a similar provision.

23. We recently traced this history in some detail in denying Entergy VY's Petition for Declaratory Ruling in Docket 7440, Order of 3/19/12. This is the Order that Entergy VY contends was not foreseeable.

24. *See* Docket 6545, Order of 6/13/02 at 78-82.

> Although the Board's ability to use its retail rate-setting authority to disallow costs associated with Vermont Yankee is limited, the Board does have broad authority to oversee the manner in which Green Mountain and Central Vermont operate. In particular, as (collective) majority owners of VYNPC, Green Mountain and Central Vermont have the capability to exert great (if not unfettered) influence over the actions of VYNPC. Our supervisory authority and rate-setting authority enables the Board to evaluate Green Mountain's and Central Vermont's management of VYNPC. If we concluded that the Vermont Sponsors had not acted reasonably, we could take limited steps to indirectly encourage the companies to act more in line with their public service obligations to Vermont consumers. For example, the Board could adjust the rate of return for the utilities.[25]

The sale of Vermont Yankee to Entergy VY would have eliminated that source of authority and could have reduced the Board's ability to influence subsequent decisions at Vermont Yankee and perhaps decide that continued operation of Vermont Yankee after the termination of its license on March 21, 2012, was not in the best interest of the state. Subsequent to the initial round of hearings in which some of the "loss of control" concerns were raised, Entergy VY entered into a Memorandum of Understanding ("MOU") with the Department that resolved their differences and resulted in the Department supporting approval of the transactions. Among the conditions of the MOU was paragraph 12, which states:

> 12. Board Approval of Operating License Renewal: The signatories to this MOU agree that any order issued by the Board granting approval of the sale of VYNPS to ENVY and any Certificate of Public Good ("CPG") issued by the Board to ENVY and ENO will authorize operation of the VYNPS only until March 21, 2012 and thereafter will authorize ENVY and ENO only to decommission the VYNPS. Any such Board order approving the sale shall be so conditioned, and any Board order issuing a CPG to ENVY and ENO shall provide that operation of VYNPS beyond March 21, 2012 shall be allowed only if application for renewal of authority under the CPG to operate the VYNPS *is made and granted*.[26] Each of VYNPC, CVPS, GMP, ENVY and ENO expressly and irrevocably agrees: (a) that the Board has jurisdiction under current law to grant or deny approval of operation of the VYNPS beyond March 21, 2012 and (b) to waive any claim each may have that federal law preempts the jurisdiction of the Board to take the actions and impose the

25. Docket 6545, Order of 6/13/02 at 80–81.

26. Emphasis added.

> conditions agreed upon in this paragraph, to renew, amend or extend the ENVY CPG and ENO CPG to allow operation of the VYNPS after March 21, 2012, or to decline to so renew, amend or extend.

Entergy VY's agreement to this provision of the MOU clarified that the Board had the ability to affirmatively decide whether Entergy VY had the right to operate Vermont Yankee after March 21, 2012, and that Entergy VY would not challenge that right. Our Order characterized Entergy VY's MOU commitment as follows:

> a very significant enhancement is ENVY's agreement in the MOU that its Certificate will terminate in 2012 and that this Board will have the full authority to review any request by ENVY to extend its license for an additional period of time. . . . By entering into a binding contractual commitment with the Department, upon which we expressly rely in reaching our decision today, ENVY has eliminated much of the jurisdictional uncertainty.[27]

The Board reflected Entergy VY's MOU commitments in the Sale Order. First, we approved the MOU (subject to certain modifications that are not germane to the issues before us today). Entergy understood that the adoption of the condition approving the MOU made it directly enforceable by the Board. In oral argument related to a later motion to amend, Entergy VY counsel stated:

> [I]f Entergy violates any conditions of the CPG or the MOU, [the Board and Department] have recourse against the company. You have the right to haul us in and take away the CPG if it's significant enough.[28]

The Board also adopted Conditions 7 and 8, which directly addressed the limits on Entergy VY's ability to operate the station that were being imposed as a condition of the sale.

> 7. Pursuant to 30 V.S.A. § 231, a Certificate of Public Good, to expire on March 21, 2012, shall be issued to Entergy Nuclear Vermont Yankee, LLC to own the Vermont Yankee Nuclear Power Station and to Entergy Nuclear Operations, Inc. to operate the Vermont Yankee Nuclear Power Station as described in the foregoing findings.

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27. Docket 6545, Order of 6/13/02 at 82. Entergy VY's motion does not request a ruling that its contractual obligations under the MOU are affected by operation of 3 V.S.A. § 814(b). As a result, we have not examined the MOU and whether a party to the MOU may be able to seek enforcement of the obligations thereunder.

28. Docket 6545, Order of 7/11/02 at 26, citing tr. 7/2/02 at 59 (Brown).

> 8. Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012.[29]

Neither of these conditions appear in the CPG. The Board made clear that the approval of the sale transaction and the issuance of a CPG to expire on March 21, 2012, relied upon Entergy VY's MOU commitments (which are also enforceable contractually).

> ENVY also agrees, through the MOU, that the Board has complete jurisdiction to decide whether to renew ENVY and ENO's Certificates of Public Good ("Certificate") if ENVY seeks to extend its operating license past the expiration of its present term. This clarification of authority and the contractual commitment with the Department (on which our approval relies) provide assurances to Vermont that ENVY and ENO cannot thwart state review if ENVY plans to operate Vermont Yankee beyond 2012.[30]

As issued, the CPG authorized Entergy VY to own and operate Vermont Yankee, but, consistent with the MOU specified that the CPG would expire on March 21, 2012. Entergy VY sought clarification of the language in the CPG in a motion filed June 21, 2002. These parties asserted that Entergy VY had continuing obligations to decommission Vermont Yankee after it finished operations and that these obligations extended beyond the March 21, 2012, expiration date. Accordingly, they requested modification of the CPG to authorize Entergy VY to continue to own and operate Vermont Yankee beyond that date for the sole purpose of decommissioning the station. We granted the requested modification, adding the following language:

> Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are authorized to own and operate Vermont Yankee beyond March 21, 2012, solely for purposes of decommissioning.[31]

The Sale Order and the Board's rationale for adopting Condition 8 thus support the conclusion we reached in the March 19 Order, namely that Condition 8 was a condition of the sale, not a condition related to the operational and ownership authority granted to Entergy VY in the Sale Order. It was clearly adopted to address concerns arising from the sale of Vermont Yankee, irrespective of the new owner. These concerns were the potential loss of control over

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29. Docket 6545, Order of 6/13/02 at 159.
30. Docket 6545, Order of 6/13/02 at 9.
31. Docket 6545, Order of 7/11/02 at 17.

the operation of the Station after March 21, 2012, that could arise. Our previous ruling is also supported by the structure of the Order — our discussion of the loss of control, the MOU provisions concerning operation after March 21, 2012, and our adoption of a condition appeared in the discussion of the merits of the sale, not in the separate section addressing the issuance of the CPG (which focused on Entergy VY's fitness).

It is also apparent that, notwithstanding its present statements that the Board's ruling in Docket 7440 was unforeseeable, it was entirely consistent with Entergy VY's understanding at the time of the sale. Like the Board's Order, Entergy VY's briefs treated the sale separately from the decision whether to issue a CPG to Entergy VY. Entergy VY submitted a brief on its own addressing the issuance of a CPG under Section 231. Entergy VY also joined in a brief with the other petitioners (VYNPC, GMP, and CVPS) that addressed the merits of the sale; this latter brief explicitly took no position on the CPG issuance question.[32] It was the latter brief, addressing the merits of the sale, that contained the Petitioners' arguments concerning the potential loss of control and how Entergy VY's commitments adequately addressed these concerns.[33] Entergy VY clearly knew that the loss of control issue related not to the CPG and the merits of authorizing Entergy VY to own and operate Vermont Yankee, but rather to the question of whether, and upon what conditions, the Board should allow the existing owners to sell the Station.

Our interpretation of the Sale Order is also guided by Entergy VY's specific representations, on which the Company asked the Board to rely. The testimony of Connie Wells stressed that Entergy VY had agreed to obtain a CPG prior to operation after March 21, 2012:

> ENVY agrees that the order in this case may state that operation of the VY Station beyond its current operating license termination date (March, 2012) is not permitted and will be allowed only *if application to the Board for renewal of the CPG is made and granted*. ENVY and ENO expressly and irrevocably agree to waive any claim they or their affiliates may have that the jurisdiction of the Board to issue the CPG is preempted by federal law.[34]

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32. Docket 6545, Petitioners' Brief at 4.
33. Docket 6545, Petitioners' Brief at 94–96.
34. Wells pf. reb. at 7–8 (emphasis added).

This statement is consistent with Entergy's specific agreement in Paragraph 12 of the MOU. This view was augmented by Entergy VY's brief, which stated: "In its prefiled testimony and in the MOU, ENVY and ENO have committed that they *will not attempt to operate the VY Station beyond its current term without obtaining an extension or renewal of its CPG* from the Board."[35] Similarly, in the joint brief filed with other Petitioners, Entergy VY reiterated its other commitments, stating that "[T]o the extent ENVY and ENO see value in a PLEX [*i.e.*, license extension], they have thus agreed that PLEX *cannot be undertaken unless the Board extends their franchise CPG beyond March 21, 2012*."[36]

Entergy VY's Proposed Findings reiterated this point that Entergy VY was committing to a condition that prohibited operation after the March 21 deadline unless the Board had affirmatively approved a license extension.

> 84. ENVY agrees to a condition in an order issued by the Board approving this sale to the effect that the Certificate of Public Good (CPG) issued by the Board will be limited to a term of years ending with the VY Station's current license termination date (March 2012) and that operation of the VY Station beyond its license termination date will be allowed only if the CPG has been renewed by the Board.[37] Kansler pfd. at 26; MOU at 12.[38]

Collectively, these statements are unequivocal — Entergy VY must both apply for and receive a CPG for operation after the March 21 deadline. Entergy VY's present statements that it assumed Section 814(b) would extend the deadline, and that a ruling to the contrary was unforeseeable, is inconsistent with the plain language of Ms. Wells' testimony and the various representations in briefs. It would have us essentially read out the various clauses stating that issuance of a CPG, not just application for one, was necessary. Instead, the conclusion is that not only did Entergy VY understand that Condition 8 was a sale condition, but that Entergy VY actively agreed to the

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35. Docket 6545, Entergy VY Initial Brief at 12 (emphasis added).

36. Docket 6545, Petitioners' Brief at 96 (emphasis added).

37. Docket 6545, Entergy VY Proposed Findings at 17 (citing Kansler pf. at 26; MOU at 12).

38. Docket 6545, Entergy VY Proposed Findings at 17–18. *See also*, Petitioners' Brief at 91 ("By Paragraph 12 of the MOU, Petitioners and the DPS agree that the CPG issued to ENVY and ENO *will not allow these companies to operate the Station after March 21, 2012, unless amended by the Board*, and that thereafter these companies will hold CPGs only to decommission the Station." (Emphasis added).

provision as a condition of the sale. The Board's Order also made clear that it was approving the sale in express reliance of these commitments from Entergy VY.[39]

Furthermore, if we accept Entergy VY's current view that it anticipated that the time limitation in Condition 8 would not be applicable during a pending application for renewal, we would have to assume that Entergy's witnesses and the representations in its briefs contained unstated caveats that effectively altered the meaning of the commitments. We decline to conclude that Entergy VY would fail to apprise the Board of material limitations on its commitments in 2002 when it was seeking approval for the sale transactions. Instead, we presume that Entergy VY's 2002 representations were accurate.[40] And we relied upon them in issuing the Sale Order.

Finally, Entergy VY's assertions that it could reasonably expect to be able to operate after March 21 under Section 814(b) assumes that the Sale and Uprate Orders and CPGs were the only impediment to continued operation. This is simply not correct; Entergy could not be certain of operating after March 21 even if section 814(b) applied. Under Paragraph 12 of the MOU, Entergy VY entered into a binding contract with the Department and other parties not to operate after March 21 absent Board authorization. Entergy VY has not challenged the validity of this commitment in its federal litigation. Thus, any of those parties could seek specific performance of the Paragraph 12 obligations at any time which, if granted, would bar operation after March 21, 2012.[41] Entergy VY thus had no reason to believe that, even if Section 814(b) extended the sale conditions as well as the CPG conditions, it could continue to operate after the deadline.

In sum, we find that Entergy VY has presented no basis for relief under Rule 60(b) based upon the unforeseeability of the March 19 Order's conclusion that Section 814(b) did not apply to Condition 8. In fact, based upon the above discussion, we find it difficult to understand how

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39. *See* text at fn. 28, above.

40. If we were to reach the conclusion urged on us by Entergy VY that the testimony and briefs had an undisclosed "unless," it would be hard not to also conclude that Entergy VY had misled the Board. Such a conclusion on a significant issue would be quite relevant to our determination under Section 231 as to whether Entergy VY is a fair partner to the state whose representations can be relied upon.

41. Entergy VY's willingness to not abide by the plain language of Paragraph 12 is also relevant to the merits of the issues before us in Docket 7862.

Entergy VY could reach any conclusion but that Condition 8 was a condition of the sale of Vermont Yankee, which was a discrete transaction (unlike the continuing activity to which Section 814(b) applies).

**B. The Deadlines in the Docket 7082 Order and CPG**

Entergy VY's second ground for relief under Rule 60(b) is that it could not foresee that the Board would rule that certain limiting conditions in the Dry Fuel Storage Order and CPG were not extended by operation of Section 814(b) once Entergy VY filed a petition with the Board. The Board found three reasons that Section 814(b) did not operate to extend the conditions. First, we concluded that there was no expiring license to which Section 814(b) might apply since the continuing activity authorized by the CPG was storage of Spent Nuclear Fuel derived from operation of the Station through March 21, 2012.

Second, the Board found that Entergy VY's interpretation of Section 814(b) would allow the Company to not only continue its operation, but also expand the scope of authorized storage. Thus, even if Section 814(b) allowed continued operation, it would still not permit expansion of Entergy VY's rights. Finally, the Board concluded that the Board lacked authority under state law to authorize the storage of fuel beyond the strict statutory limitation of "the amount derived from the operation of the facility up to, but not beyond, March 21, 2012."[42] Only the legislature had such authority. Since the Board had no statutory authority to grant the amendment to the DFS Order and CPG, Entergy VY's petition would not trigger Section 814(b).

Entergy VY's motion states that this ruling was unforeseen. Yet nowhere in Entergy VY's motion does it demonstrate why anything in the Board's March 19 Order related to the DFS Order and CPG should not have been reasonably foreseeable. In particular, the Board's Order makes clear that Entergy VY may continue doing what it was authorized to do previously — construct a DFS storage facility for the purpose of storing SNF generated from operation prior to the March 21, 2012, deadline for ceasing operation set out in condition 8 of the Sale Order and several conditions in the DFS Order and CPG. Entergy VY instead is seeking to use section 814(b) to authorize something different — the storage of SNF generated after March 21, 2012.

42. 10 V.S.A. § 6522(c)(2).

That activity is not simply a continuation of the previous rights but an expansion of them. Yet, as we observed in the March 19 Order, Entergy VY has presented no basis for concluding that Section 814(b) allows the Company to obtain additional rights, rather than simply continue to exercise its existing rights.

We thus conclude that Entergy VY has not shown that the Board's March 19 Order as it pertained to conditions in the DFS Order and CPG was unforeseen and, accordingly, deny it.

**C. Unforeseen Intervening Events**

Entergy VY's third cited basis for granting relief under Rule 60(b) is that it could not anticipate that the legislature would prevent the Board from acting on Entergy VY's petition for a modification to its CPG to authorize operation of Vermont Yankee beyond March 21, 2012. Entergy VY asserts that it expected to have a Board Order authorizing continued operation well before the expiration of its authorization to operate and that it could not anticipate the events that led to the Board being unable to issue an Order on the reauthorization petition.

We find this argument unpersuasive. We recognize that events have transpired since the Board's approval of the sale in 2002 that have altered the procedural landscape and approval requirements. Some of these were the result of legislative action; others, such as the need for construction of a facility to store SNF that led to Entergy VY requesting statutory changes, were directly attributable to choices that Entergy VY made. For example, the need for the DFS facility itself arose because Entergy VY elected to increase the power output of Vermont Yankee by 20%, thus consuming fuel more quickly. The legislature's actions certainly changed the landscape for regulatory approval for extending the authorization to operate Vermont Yankee beyond March 21, 2012, and as such contributed to the present situation in which Entergy VY has not received a final decision on whether it may operate after March 21, 2012, the date it committed to cease operations. But a fair reading of the history indicates that Entergy VY made tactical choices at each step of the process, such as deferring challenges to statutes it believed were preempted, that ultimately created the hardship of Entergy VY having to decide whether to operate without state authorization. Nonetheless, had Entergy VY made different choices, such as immediately challenging the legislative enactments it asserted were preempted, it would not be

in the present situation. To be clear, the Board does not fault Entergy VY for the choices it made. In a different set of circumstances, Entergy VY's strategy might have produced better results for itself. Evaluation of the merits of Entergy VY's approach is not before the Board. Instead, the question is whether Entergy VY has demonstrated good cause to be relieved from judgment pursuant to Rule 60(b). Here, the Vermont Supreme Court has made clear that Rule 60(b) is not available to relieve a party of the effects of tactical decisions. Entergy VY has failed to present any arguments that would demonstrate that it was unanticipated legislative action, rather than Entergy VY's knowing decisions of how to react to such action, that resulted in the present situation.

The first intervention cited by Entergy VY was the legislature's enactment of Act 74, which amended Chapter 157 of Title 10. Entergy VY observes that at the time it purchased Vermont Yankee, the legislature had not passed Act 74 "to insert itself into the process of the Board's review of an application for a renewed CPG for SNF storage for the period after March 21, 2012."

Entergy's characterization of Act 74 misses several key facts. Under Vermont law as it existed prior to the enactment of Act 74, Entergy could not construct a DFS facility absent legislative authorization. Specifically, Section 6501(a) of Title 10 provided that:

> No facility for deposit, storage, reprocessing or disposal of spent nuclear fuel elements or radioactive waste material shall be constructed or established in the state of Vermont unless the general assembly first finds that it promotes the general good of the state and approves, through either bill or joint resolution, a petition for approval of the facility.[43]

This prohibition did not apply to all such storage facilities. The legislature exempted any nuclear generating facility approved under 30 V.S.A. § 248(e)[44] and the storage of spent nuclear fuel by VYNPC at its existing site.[45] Neither of these exceptions applied to Entergy VY, but it would have applied to the previous owners of Vermont Yankee or if Entergy VY had elected to structure the acquisition to gain ownership over VYNPC. As a result of Section 6501(a), the legislature already had a role in the approval for any DFS facility (and had such role since the

43. This section had been adopted in 1977.

44. 10 V.S.A. 6503(d).

45. 10 V.S.A. § 6505. The prohibition was explicit to VYNPC, which no longer owns Vermont Yankee.

1970's) to the extent that Entergy VY needed to construct a facility to store SNF; Act 74 did not add a legislative role.[46] Moreover, Entergy VY was also prohibited by the Sale Order and CPG from operating beyond March 21, 2012.

Act 74 became necessary not because the legislature sought a role for itself, but because of Entergy VY's needs. Within a few years of purchasing Vermont Yankee, Entergy VY modified the station to increase its generating capacity by 20%; this was termed a power uprate. The Board approved Entergy's power uprate in Docket 6812.[47] Increasing the power output, however, also increased the rate at which Entergy VY would use fuel, which meant that the capacity of the spent fuel pool at Vermont Yankee would be exhausted before the end of the operating license in 2012. Entergy VY, therefore, determined that it needed to construct a DFS facility at the Vermont Yankee site.

Entergy VY worked with the legislature to secure adoption of Act 74 (2005).[48] The primary effect of this Act was not to increase regulation of Vermont Yankee, but to remove the long-standing prohibition against construction of a spent-fuel storage facility, subject to certain conditions. In fact, to a large extent, Act 74 permitted Entergy VY to construct an otherwise prohibited DFS Facility, while also inserting conditions that maintained the *status quo ante* with respect to the allowable period of operation. Entergy VY was required to obtain approval from the Board under Section 248 of Title 30 prior to construction of such a facility. The legislature set forth several standards for the Board to examine in addition to the normal Section 248 criteria.[49] The legislature specified several limiting conditions. These included the following that are relevant to the Declaratory Ruling:

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46. In its Reply Brief, Entergy VY argues that the approval of the General Assembly "became necessary only after the Attorney General opined in 2004 that a statutory exemption for construction of a spent fuel facility was owner-specific, not site-specific." Entergy VY Reply Brief at 8. The underlying statute that the Attorney General interpreted, however, was not ambiguous. It contained an exception from the legislative approval requirement for VYNPC not for Vermont Yankee, nor did it extend the exception to VYNPC's successors and assigns. The Board, in fact, had suggested the need for legislative approval for a DFS facility during the uprate proceeding, prior to the issuance of the Attorney General's opinion. *See* Docket 6812, Order of 3/15/04 at 54.

47. Docket 6812, Order of 3/15/04.

48. This is described at pages 12 and 13 of the Order from the US District Court in Vermont. *Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, Inc. v. Shumlin, et al*, Docket No. 1:11-cv-99 (1/19/12, U.S. Dt. Ct. Vt.).

49. 10 V.S.A. 6522(b).

> (2) Any certificate of public good issued by the board shall limit the cumulative total amount of spent fuel stored at Vermont Yankee to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license. Authorized capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.
> (5) Compliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before the owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30.

In Section 6522(c)(4), the legislature also provided that any storage of spent fuel from operation after March 21, 2012, required further legislative approval. The federal District Court has ruled this provision to be preempted by federal law.[50]

At this point, Entergy VY had a choice. If it believed that Act 74 was impermissible, it had the option to challenge Act 74 immediately in federal court. Instead, Entergy VY elected to wait more than five years to initiate such a challenge. This reflects a tactical choice by Entergy VY. Under Vermont Supreme Court precedent, Rule 60(b) is not available to relieve a party from such choices. But Entergy VY did more than simply defer a challenge. It elected to take the benefits of Act 74, by constructing a DFS facility that was barred prior to the enactment, while deferring a challenge to conditions that largely retained existing limitations. It is hard to understand Rule 60(b)'s purpose of preventing injustice can be squared with Entergy VY's approach to Act 74 — requesting legislative authorization to construct a DFS facility, supporting that legislation, taking advantage of the benefits of the legislation, and then, years later, challenging as impermissible portions of the law that largely set out in statute the legislature's role and incorporated certain legal obligations on Entergy VY under pre-existing Board Orders and CPGs.

Entergy VY made a similar choice with respect to the 2006 enactment of Act 160. Here, the legislature added subsection (e)(2) to Section 248, which provides as follows:

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50. *Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, Inc. v. Shumlin, et al*, Docket No. 1:11-cv-99, at 99 (1/19/12, U.S. Dt. Ct. Vt.).

> (2) No nuclear energy generating plant within this state may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the general assembly approves and determines that the operation will promote the general welfare, and until the public service board issues a certificate of public good under this section. If the general assembly has not acted under this subsection by July 1, 2008, the board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.

Unlike Act 74, where the legislature already had a role, there is no question that Act 160 inserted an additional hurdle into Entergy VY's ability to extend its right to operate under Vermont law. The statute prohibited the Board from issuing a final order or CPG until authorized by the legislature, thereby adding legislative approval to the requirements. It would also be fair to conclude that at the time of the sale, Entergy VY might not have been able to anticipate such statutory changes.

Nonetheless, we cannot find that the legislative changes themselves justify relief under Rule 60(b). Once again, Entergy VY had the option of challenging the legislation immediately. This would have provided ample time for resolution of the challenge and then a full Board review of an application for license renewal. Entergy VY did not choose this option, but instead sought Board approval (almost two years later). Only in April 2011, five years after passage of Act 160, did Entergy VY challenge the statute. As we stated above, the Board does not suggest that Entergy VY made either a wise or a poor choice in waiting to initiate a challenge; the merits of different strategies are irrelevant to the motions before us. What is relevant, however, is that Entergy VY selected a strategy to seeking authorization from the state of Vermont for the right to operate Vermont Yankee after March 21, 2012. That tactical decision is a significant reason Entergy VY does not yet have a final decision on its license renewal request.

The present situation is also a product of Entergy VY's strategic decisions concerning how to structure its request for Board approval. Entergy VY filed a combined application in 2008 seeking authorization from the Board under Section 231 and 248(e)(2). It presented a unified set of testimony on the two separate authorizations. It subsequently challenged the latter section and has now filed for approval under Section 231 alone. However, Entergy VY did not

challenge the Board's jurisdiction under Section 231. Since Entergy VY knew that it would need approval under Section 231 even if it prevailed in its challenge to Section 248(e)(2), the Company could have filed separate petitions so as to preserve its legal options and avoid having the evidence commingled.[51]

Entergy VY's arguments also rely upon the assumption that the intervening legislative actions are a significant factor in Entergy VY not receiving a Board ruling on its requested CPG amendment at this time, because they prevented the Board from acting on the request. The record of Docket 7440 suggests that any delay caused by the legislative prohibition in Section 248(e)(2) against issuance of a final order or CPG under that section was limited. The Board held hearings on Entergy VY's petition at the end of May and early June 2009. Reply Briefs were filed on August 7. The Board required time after those filings to write an Order. At this point, the uncertainty concerning the Board's ability to act first arose. The Board convened an Oral Argument on October 7, 2009, to explore the parties' views on the Board's authority.

On January 14, 2010, however, the question of whether the legislature barred action by the Board lost its significance. On that date, the Department filed a letter stating that Entergy VY "did not provide accurate information" to the Department or its contractor concerning the existence of certain underground piping systems. At that point, the Board held further proceedings related to whether Entergy VY had been fully accurate in its testimony and discovery responses. The Board issued an Order on January 29, 2010, in which we stated that we would not hold further hearings until informed by the Department that we should proceed. We also stated that we would schedule a status conference once the Department informed us it had sufficient information to proceed. Entergy VY filed updates and corrections to the testimony and other filings in September 2010. No party, including Entergy VY requested that the Board move forward until January of 2012, when the Department asked for a prehearing conference in the wake of the District Court decision. This procedural history indicates that, at most, the period between August 2009 (the filing of Reply Briefs) and January 2010 (the revelation that Entergy VY had not been fully accurate in filings made during Docket 7440) are attributable to the

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51. It is not clear that the legislative bar in Section 248(e)(2) applied to a petition filed under Section 231. By its own terms, it applies to approvals under "this section" (*i.e.*, section 248) and 10 V.S.A. Chapter 157.

legislature; a material portion of that time would have been required for writing a decision even if Section 248(e)(2) had not existed. After the January 2010 disclosure that the evidentiary record was not fully accurate, the Board was not in a position to issue an Order absent further proceedings.[52]

In its Motion, Entergy VY argues that it would be unfair to punish the Company for the delays in issuing a final Board Order "given that they stemmed from Vermont statutes that have now been found (by the District Court) to be preempted by federal law or enjoined."[53] Based upon the litigation and legislative strategies Entergy VY chose to employ, we agree with Entergy VY that the prohibition in Section 248(e)(2) has played a role in delaying a final decision on Entergy VY's request. But it is also clear that Entergy VY had available other strategic choices that would have resulted in federal rulings far enough in advance that no delay would have occurred. And as we stated in the previous paragraph, between the time that Entergy VY revealed that it had not been fully accurate in describing underground piping systems and January 2012, Entergy VY made no request for the Board to proceed. Because Rule 60(b) is not available to relieve a party "from tactical decisions which in retrospect may seem ill advised," we deny Entergy VY's motion for relief based upon the unforeseeable legislative action.

**D. Hardship to Entergy VY**

Entergy VY also argues that it is "already laboring under the hardship caused by the uncertainty of how the Board will treat operation as authorized by the federal court jurisdiction."[54] Entergy VY maintains that the hardship it faces is associated with the possibility that the Board would deny Entergy VY's CPG petition in Docket 7862 based upon the continued operation of Vermont Yankee after March 21, 2012.

We find that Entergy VY has not demonstrated a hardship that merits relief under Rule 60(b). Prior to the March 21, 2012, deadline set out in Condition 8 of the Sale Order and in the

52. We recognize that Entergy VY may have considered it futile to request that the Board undertake further action in Docket 7440 after the Vermont Senate voted against removing the limitation in Section 248(e)(2) during 2010. However, it is also clear that Entergy VY's misstatements concerning the existence of underground pipes left the Board with a record on which it could not make a final determination.

53. Entergy VY Motion at 10.

54. Entergy VY Reply Comments at 7.

several conditions of the DFS Order and CPG, Entergy VY filed a request for a Declaratory Ruling in Docket 7440 that the Company could continue to operate Vermont Yankee after March 21, 2012. The Board, on March 19, 2012, denied that motion. At that point, Entergy VY could have avoided hardship by complying with the Board's Order. Entergy VY also could have sought reconsideration (rather than waiting several months before filing the instant motion). Or Entergy VY could have sought immediate, interlocutory review of the Board's decision and a stay from the Board pending such review. Entergy VY chose none of these options. Instead, it voluntarily elected to continue operating Vermont Yankee even after the Board affirmatively stated that Condition 8 of the Sale Order and the applicable conditions in the DFS Order and CPG were not extended by 3 V.S.A. § 814(b). Thus, any hardship Entergy VY faces is a direct result of choices it made *after* (1) asking the Board whether it had the authority to operate after March 21, 2012, under existing Orders and CPGs and (2) being told that Condition 8 (which barred operation after March 21, 2012, absent Board approval) continued to apply.

Entergy VY's argument rests in part upon its statement that the federal court has affirmatively authorized Vermont Yankee to continue to operate, notwithstanding existing Board Orders. The Court's judgment, however, focuses on the Board not taking action to shut down Vermont Yankee based upon the failure to obtain legislative approval.

> Plaintiffs have demonstrated they would be irreparably harmed by Vermont Yankee's closure under preempted laws if Defendants enforced Act 160, or the preempted provision in Act 74 . . .
>
> Mindful that relief must be "narrowly tailored to fit specific legal violations," the Court orders, for the reasons described in this opinion, see Fed. R. Civ. P. 65(d), the following permanent injunctive relief:
>
> 1. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.
>
> 2. Defendants are permanently enjoined, as preempted under the Atomic Energy Act, from enforcing the single provision within section 6522(c)(4) of title 10, enacted as part of Act 74, stating "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter," by bringing an enforcement action, or

> taking other action, to compel Vermont Yankee to shut down or to prevent storage of spent nuclear fuel after March 21, 2012 because it failed to obtain legislative approval (under the same preempted provision) for a Certificate of Public Good for storage of spent fuel, as requested by Plaintiffs' pending petition in Public Service Board Docket No. 7440, or in any subsequent petition.[55]

As this Order makes clear, the absence of legislative approval does not bear on our interpretation of our previous Orders. This Order also is not inconsistent with the specific language of the District Court's judgment. However, we do expect that Entergy VY's compliance with our Orders and its willingness to abide by affirmative commitments in testimony and briefs will be relevant considerations in any decision the Board makes concerning modification of Entergy VY's existing CPGs.

## VI. CONCLUSION

For the reasons set out above, the Board denies Entergy VY's motion to amend Condition 8 of the Sale Order, which prohibited operation of the Vermont Yankee Nuclear Power Station after March 21, 2012, without Board approval and conditions in the Dry Fuel Storage Order and CPG that limit the amount of spent nuclear fuel that Entergy VY may store at the Vernon site to amounts generated from operation up to March 21, 2012.

**SO ORDERED.**

55. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. v. Shumlin et al*, Docket No. 1:11-cv-99 at 100–101.

Dated at Montpelier, Vermont, this 29th day of November, 2012.

| | | |
|---|---|---|
| s/ James Volz | ) | |
| | ) | PUBLIC SERVICE |
| | ) | |
| s/ David C. Coen | ) | BOARD |
| | ) | |
| | ) | OF VERMONT |
| s/ John D. Burke | ) | |

OFFICE OF THE CLERK

FILED: November 29, 2012

ATTEST: s/ Susan M. Hudson
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*